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Too Much, Too Little, Too Late? Reflections on Law and Ethics in the EU's Foreign Policy

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1. Introduction

When asked to reflect on whether there might be too much law in the foreign policies of the European Union (CFSP/CSDP), several hypotheses can possibly be developed, and several preliminary questions need to be asked.[2] Whenever there is talk of 'too much', or 'too little' or, for that matter, 'just enough', the obvious follow-up question should be: too much, or too little, for what purpose exactly? From which perspective? From whose point of view? The claim that there might be too much law presupposes that law serves a particular purpose, which would seemingly be better served if there were a little less law; the claim that there might be too little law, conversely, suggests that for that particular purpose, there should perhaps be more law, not less. And all this, it should be noted, leaves unmentioned the question whether the law concerned (of which there is too much, or too little) is actually any good, either instrumentally (in that it helps serve the purpose it is supposed to serve) or normatively (in that it is the sort of law we might also welcome on moral grounds).

In the specific context of the EU, several additional questions need to be asked. Is the amount of law just right for internal purposes, or should the focus rest on external issues? In the former case, one might think of the law serving the purpose of balancing the positions of the member states and the EU's institutions in some way or another: the right amount of law then is the amount that keeps the chosen balance, well, in balance, so to speak.

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[2] My approach differs from De Witte's a decade ago, addressing the question whether there would be too much constitutional law. It is fair to say my approach situates itself on a different level of abstraction. See Bruno de Witte, 'Too Much Constitutional Law in the European Union's Foreign Relations?', in Marise Cremona and Bruno de Witte (eds.), *EU Foreign Relations Law* (Oxford: Hart, 2008), 3-15.

What is just the right amount of law for internal purposes, however, may be way too much law to allow for swift and decisive action externally. Thus, commentators might complain about the amount of red tape required to get any action under way: surely, a foreign policy incident requiring quick action by the EU might not be best served by an overdose of law, so the argument could go.

Even this does not exhaust the possibilities though: while the EU might want swift action on some level, the world at large might be better off if the EU is forced, through legal inhibitors, to act slowly: one would not want to add another hotheaded entity to the circus of international politics, populated as it is these days by macho men with short fuses and long twitter accounts. A cool head might be preferable, and a forced waiting period, imposed by law, might be just the way to force heads to cool off.[3]

And then there is the question of alternatives. Surely, consultation of member states will be required, whether the obligation to consult is legal in nature or whether it is considered to be part of some extra-legal gentlemen's agreement, or whether considered to be politically prudent, or considered to contribute to an action's legitimacy. In case the obligation is legal in nature one can possibly complain about there being too much law, but not in the other cases – if there is no law involved, then there cannot be too much law, but that does not automatically entail the absence of rules *generaliter*.

In what follows, I will discuss two incidents where, one might say, the amount of law is somehow at issue, mindful of the above-mentioned caveats. The first addresses the curious position of the staff of the EU Police Mission in Bosnia and Herzegovina; the second takes a closer look at the EU's strained relationship with Ukraine. The point I aim to make is that sometimes it is not about too much law or too little law or just enough law; sometimes things are more about the mindset of the relevant actors than about any relevant rules. Important as rules are (legal or otherwise), they are, eventually, better seen as signposts than as absolutes. They offer guidance and ought to be followed, but not blindly or at all

[3] The thought is of course far from original: it inspired article 12 of the League of Nations Covenant, institutionalizing a cooling off period in case of belligerent sentiments.

costs.[4] Indeed, rules cannot even be followed slavishly, in that it takes practical wisdom to figure out whether some rule or other applies, and it takes practical wisdom to apply it wisely.[5] Or, as the song goes, 'It ain't what you do, it's the way that you do it'. The two incidents I aim to discuss form illustrations or anecdotal evidence ('anecdata') of that particular proposition, and will be followed by reflections on normative pluralism and a more philosophical elaboration on the place of practical wisdom – what Aristotle referred to as *phronesis* - in all matters legal.

2. The EU Police Mission in Bosnia and Ms H.

Monty Python, if it would still exist, would have a field day with the following scenario. The EU operates a mission in Bosnia and Herzegovina to spread the Rule of Law to this conflict-ridden and contested piece of Europe. The Rule of Law is a notoriously indeterminate concept, but is often thought to include as a minimum basic human rights protection, including such things as access to justice.[6] And indeed, this is how the EU usually presents the Rule of Law to outsiders: part of the Rule of Law, as most have agreed since Weber,[7] involves the possibility for those who feel their rights have been infringed to seize a court.
Enter the EU. After the United Nations had been exercising policing tasks in war-torn Bosnia and Herzegovina for a number of years following the Yugoslav war,

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[4] This generally builds on Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991).
[5] On legal reasoning generally see Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, 1989).
[6] For an overview, see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004); see also Leonardo Morlino and Gianluigi Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Leiden: Brill, 2010).
[7] While the term Rule of Law is often held to be coined by Dicey in the late 19th century, it is indelibly associated with the great legal sociologist Max Weber, *Economy and Society* (Berkeley CA: University of California Press, 1978, Guenther Roth and Claus Wittich eds.) The important point to note is that for Weber, it mattered little what the law said, as long as there was law; the association between the Rule of Law and quintessential liberal values came later and owes much to Friedrich A. Hayek, *The Road to Serfdom* (London: Routledge, 2001 [1944]).

its role was taken over by the EU in 2002, by means of the European Union Police Mission (EUPM), set up on the basis of a Council Joint Action which itself was based on Articles 28 and 43(2) of the Treaty establishing the European Union (TEU). All this was part of the much-heralded Common Foreign and Security Policy (CFSP) – the EU's bid to be taken seriously on the international scene as a power to be reckoned with, and one that prefers carrots over sticks, soft power over hard power. Among the values that this global power seeks to advance are democracy and free trade, but also the rule of law and fundamental human rights – article 21 TEU provides a list of the principles and values Europe holds dear and which shall guide its external activities.

Indeed, the EUPM was considered part of a 'broader rule of law approach' in Bosnia and Herzegovina, supporting local law enforcement agencies in the fight against organized crime and corruption. Missions such as EUPM are often planned to be of limited duration and demand a special kind of expertise, not always readily available within the organization responsible; as a result, often they work with people seconded by either their home governments or one of the EU institutions.

So too in this case. Ms H was an Italian magistrate, seconded by the Italian government to work for a period of time for EUPM. As it happened, she was first stationed, since late 2008, as a Chief Legal Officer in Sarajevo but, from April 2010 onwards, redeployed as Criminal Justice Adviser – Prosecutor in the regional EUPM office in Banja Luka. This she took to be a demotion, and she lodged a complaint with the Italian authorities: since she was seconded, it would seem that she was working under Italian command. Italy duly suspended the decision to redeploy her, but the Head of Mission confirmed the decision, claiming a need for prosecutorial advice in the Banja Luka office. Thereupon, Ms H went to court both in Italy and in the EU, seizing the General Court and requesting annulment of the decision to redeploy her and an award of damages. The General Court denied jurisdiction and held that the case was inadmissible[8], but on appeal the ECJ

[8] Case T-271/10, *H.* v *Council and Others*, ECLI:EU:T:2014:702.

disagreed, finding that the case was at least partly within the jurisdiction of the EU courts. It eventually referred the matter back to the General Court.[9]

The case provides a lovely illustration of what public administration scholars refer to as the problem of the many hands.[10] EUPM consists partly of its own staff, recruited on a contractual basis in order to cater for specific needs. Mostly, however, it consists of staff that is seconded, either from the EU institutions, or (as in the case of Ms H) from member states. According to the relevant Council Decision 2001/264/EC, the seconding entity shall be the one answering possible claims, with the obvious result that the possibility might arise that different individuals working for the same entity (i.e., EUPM) could be subject to different rules and, what is more, subject to different regimes relating to judicial remedies. In extremis, it might even be the case that some would have access to the EU courts while their colleague at the opposite desk would be denied such access. This, clearly, would be undesirable, so the Council launched the simple argument that no one should have access to the EU courts. In the Council's view, decisions such as the one to redeploy Ms H were operational CFSP decisions, and as such by definition excluded from the jurisdiction of the EU courts.[11]

The General Court, active in first instance, did not quite agree, but did find that it lacked jurisdiction.[12] Illustrating the wonderful artificiality that legal thinking may sometimes take on, the General Court argued that while the deployment decision was taken by the Head of Mission, the fact that Ms H was seconded by Italy meant that the decision could be attributed to Italy, and that any relief would have to be sought before the Italian courts. This was different from the situation concerning those seconded by EU institutions. Hence, the General Court did not

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[9] Case C-455/14 P, *H.* v *Council and Others*, ECLI:EU:C:2016:569.

[10] The classic treatment is by Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, 1998). Passing the buck is not uncommon with (other) international offices either: see *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed Against the International Fund for Agricultural Development*, advisory opinion, [2012) ICJ Reports 10.

[11] A more subtle variation of the argument holds that jurisdiction of the EU courts over the CFSP is limited in accordance with the intentions of the member states (*Herren der Verträge*, after all) and reflecting the special position of the CFSP in the EU's legal order. Expanding the jurisdiction of the Court requires legal justification, and not merely an integrationist or activist Court. For such an argument, see Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy', (2017) 66 *International and Comparative Law Quarterly*, forthcoming.

[12] Case T-271/10, *H.* v *Council and Others*, ECLI:EU:T:2014:702

(unlike the Council) deny jurisdiction altogether, but it did deny jurisdiction for those seconded by national authorities.

Moreover, it made the point that none of this would result in the absence of a judicial remedy. After all, Ms H would have access to Italy's courts! This would come with an uncomfortable drawback though – one that the General Court itself referred to, but failed to think through. Should Italy's courts decide that the deployment decision had been problematic, it was for Italy's courts to decide what to do and 'draw the appropriate conclusions with respect to the legality, or even the very existence, of the contested decisions.'[13] The phrasing suggests that Italy might be in a position to invalidate decisions taken by the Head of Mission of EUPM – quite a far-reaching claim with the potential to fragment the management of the mission and, more fundamentally, to break through the unity of EU law – hence, it was never likely that the ECJ would reach the same result.

And it did not. Instead, it adopted a different frame. Contrary to the General Court, it did not view the contested decision as a matter relating to secondment, but rather as a decision relating to staff management, regardless of the question whether the staff was directly hired by EUPM or by whom it was seconded, and regardless of the fact that the mission generally fell within the ambit of the CFSP. As a result, the deployment decision fell within the regular scope of reviewable decisions, as enumerated in article 263 TFEU and (with respect to non-contractual liability) article 268 TFEU. The one thing the Court denied was that the Commission was in any way involved, but it accepted jurisdiction with respect to the role of the Council, as it was the Council that was involved in the setting up and the running of EUPM.

The Court's solution also had the pleasant side-effect that, eventually, awkward questions about access to judicial remedies could be circumvented. After all, article 47 of the EU's very own Charter on Fundamental Rights guarantees a right to an effective remedy for everyone whose rights are supposed to be guaranteed by EU law, and Ms H was quick to rely on it.[14] It would be ironic, to say the least, if such a right were denied to the people actively aiming to instill the same right in

[13] *Ibid*., para 53.
[14] As noted in *ibid*., para. 30.

entities outside the EU, such as Bosnia and Herzegovina.[15] So, all's well that ends well, eventually. Ms H received access to justice, and the Court of Justice could claim jurisdiction over a little part of CFSP activities, bringing this little part under the umbrella of the EU rather than leaving it to the more inter-governmentally oriented CFSP itself. That said though, it remains mystifying that people in positions of power can even think of exporting the rule of law while unblinkingly ignoring it at home – the very fact that Ms H had to go to court in order to get her day in court, and had to appeal, suggests that something is not quite right; the very fact of staff members of the same mission being treated differently depending on their original employment suggests that something is not quite right. The story suggests an over-reliance on rules perhaps, and an underappreciation of the old wisdom that one should not do unto others what one does not want done unto oneself.

3. Ukraine and the Laws of Good Intentions

If the case of Ms H posits several legal orders against each other, the story concerning the EU's involvement with Ukraine is more geared towards characterization as a law versus ethics conflict, invoking two distinct normative orders but not two distinct legal orders.[16] The broad outline goes as follows.[17]

Since the fall of the Berlin wall, it has been a priority of the EU's foreign policy to create closer ties with the now-independent parts of the former Soviet Union, as well as the latter's satellite states. And the policy has met with great success, at

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[15] While the Italian courts are under an obligation to give effect to the EU Charter, one wonders how keen they would be to do so with respect to an individual working for one of the EU missions, even if it concerned someone seconded by the Italian authorities. One could forgive them for thinking that the first port of call for EU employees ought to be a judicial organ of the EU, if only because local courts cannot be expected to invalidate EU decisions, whether operational or administrative.

[16] On such normative conflicts generally, see Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge University Press, 2013).

[17] Methodological alarm-bell: the rendition of the facts of the story owes much to Wikipedia (https://en.wikipedia.org/wiki/Ukraine%E2%80%93European_Union_relations – visited 13 July 2017). That is not ideal, but not detrimental, in that even if the facts turns out to be mistakenly rendered, the moral of the story still stands. My aim is not to write the definitive story of EU-Ukraine relations (in which case I should not rely as much on Wikipedia); my aim, instead, is to make on point on good intentions and their effects.

least terms of creating such closer ties. Former members of the enemy camp, such as Poland, Hungary, Romania and Bulgaria, have all joined the EU, and with several others, including Russia itself, some kind of partnership agreement has been concluded. Part of this has been captured in the adoption and prioritization of the EU's neighbourhood policy, following the earlier adoption of Agenda 2000.[18]

One of the states that the EU is keen on establishing closer ties with is Ukraine, for a variety of reasons, some perhaps bordering on cynicism. There are the usual geopolitical reasons, with Ukraine bordering several EU member states. There are the usual strategic reasons, with Ukraine offering one route for the transportation of Russian natural gas to European cities. And there might be the added benefit of pestering Russia a little: since Russia tends to view Ukraine as part of its sphere of influence, capturing Ukraine would represent quite a coup.[19] For a decade, a partnership agreement was in place, and Ukraine repeatedly expressed a desire to move towards an association with the EU, widely viewed (although not by the EU itself) as a prelude for eventual full membership.

After the partnership agreement had expired a new association agreement had been prepared (though without guarantees about future membership), but the EU started to dither and cited human rights concerns as a reason not to go full speed ahead. This was inspired by the imprisonment in Ukraine of former Prime Minister Yulia Tymoshenko and other political leaders, with their imprisonment signaling a dwindling respect for human rights, democracy and the rule of law. That was no doubt a fair assessment, and it raised the classic problem of the dirty hands in one of its many manifestations.[20] Should a political actor engage in doing something of a dubious ethical nature if doing so serves, in his or her opinion, the common good? In this case, starkly put: should the conclusion of an association agreement, meant to be of mutual interest and benefit, be suspended over the plight of a few individuals?

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[18] For early analysis, see Marise Cremona, 'The European Neighbourhood Policy: More Than a Partnership?', in Marise Cremona (ed.), *Developments in EU External Relations Law* (Oxford University Press, 2008), 244-299. See also …, elsewhere in this volume.

[19] Note that Russia was invited to join the European Neighbourhood Policy, but declined.

[20] The seminal study is by Michael Walzer, 'Political Action: The Problem of Dirty Hands', (1973) 2 *Philosophy and Public Affairs*, 160-180; see also Stuart Hampshire (ed.), *Public and Private Morality* (Cambridge University Press, 1978).

Of course, facts are never quite what they seem. The 'few individuals' at issue here include political leaders, whose symbolic value is huge. Put differently and without being cynical, it is not at all self-evident that the EU would have adopted a similar course of action if the political prisoners had been ordinary people, a few factory workers perhaps, or a handful of bus drivers. It was, arguably, not the imprisonment as such, but the identity of those imprisoned, which spurred the EU to using the Association Agreement as the carrot to dangle in front of Ukraine's nose.

It may also be of relevance whence this upsurge in ethical thinking came. Again, without being cynical, Europe's leaders are perfectly capable of ignoring or massaging requests stemming from fringe groups, or even from the relevant non-governmental organizations (think of Amnesty International, e.g.). In this case, however, the pressure was reportedly exerted by the European People's Party, the network of center-right political parties that governs many of the EU member states and also occupies a prominent position in the Commission. And that is a source of discontent that is difficult to ignore.

And then there are the expected benefits of the agreement itself. An important strand of political philosophy suggests that an improving economic situation, especially in conjunction with free trade and liberal markets, will generally also improve the chances for human rights. In other words, it is often posited that free trade is not just good for the economy (assuming it is and ignoring distributive questions), but has a radiating effect on other matters. In such a constellation, one might have expected strong support for the Association Agreement precisely with a view to stimulating human rights.

So, essentially, the politics configured to place ethics at the center of the debate or, if you will, pit ethics against law: Ukraine will become an association partner, based on a legally binding treaty commitment, if and when it shows respect for European values related to human rights, democracy and the rule of law. It is important to see that the ethical argument could work in two directions though: halting the conclusion could be ethically motivated ('How can one do business, even associate oneself, with a state that imprisons political opposition?'), but so could continuing with the agreement ('Should a general expected human rights

improvement be held hostage for a handful of individuals, no matter how prominent?'). The first line of reasoning follows Kantian thought, according to which one should not depart from one's duties (in this case, to insist on respect for the rights of Tymoshenko and others), regardless of the consequences. The second approach, usually associated with Bentham and others, is rather consequentialist in nature, suggesting that a small sacrifice here may well lead to overall beneficial results.[21]

What further complicated matters, though, and was insufficiently recognized by either of the two ethical groups, was that Ukraine borders Russia, contains a large Russian-speaking population, and includes territory that to Russia was of considerable value in the form of Crimea, with its port of Sevastopol. And, as is well-known by now, the moment the EU started to dither it created a political vacuum in Ukraine, and Russia's leader Vladimir Putin was keen enough to seize the moment, catching many observers by surprise. Hence, the net result of the EU's dithering, so it may be claimed, is the annexation of Crimea by Russia – the road to hell, as they say, tends to be paved with good intentions.[22]

For deontologists, Kantian or otherwise, such poses no specific methodological problems: one simply needs to do one's duty and follow such rules are applicable – although it may become difficult to figure out which rules are applicable, which duties are in existence, and how to prioritize among them if several different and possibly conflicting rules are applicable. The consequentialist, however, is faced with additional methodological problems, for how can one determine which factors go into the equation to find out what the greatest benefit for the greatest number is? In other words, for a consequentialist analysis to be persuasive, the analyst must ensure that all relevant factors are included, and this is a difficult, perhaps impossible, task. The Ukraine agreement does not merely involve the human rights of some prominent individuals and the assumed economic benefits

[21] The leading consequentialist these days is probably Peter Singer who, rare among ethicists, has also applied his thoughts to international affairs. See Peter Singer, *One World: The Ethics of Globalization*, 2nd edn (New Haven CT: Yale University Press, 2004).

[22] For analysis of the legality of Russia's action, see Thomas D. Grant, 'Annexation of Crimea', (2015) 109 *American Journal of International Law*, 68-95.

of the agreement accruing to Ukrainians and the EU's citizens – it need also factor in geopolitical considerations, the likelihood of Russia stepping in, the potential costs of a split Ukraine, et cetera. On such a reasoning, it may be plausible to claim that there is little scope for consequentialism in international affairs, since the calculus is simply too complicated, making it impossible to determine with any degree of accuracy what the greatest good for the greatest number will be.[23]

4. Pluralism (of Various Kinds)

Both episodes have in common that they pit different normative systems against each other. In the case of Ms H., it concerns a conflict concerning the appropriate forum against the background of a possible conflict between two legal orders (the EU legal order versus Italy's legal order), while in the case of Ukraine, the discussion is better seen as two contending ethical conflicts or, perhaps, one of law versus ethics. Either way, both prompt questions as to how to act in such circumstances, and as such, both are inescapably in tune with the modern condition. After all, decision-making rarely, if ever, takes place in a normative vacuum where the decision-maker can simply apply whatever his (usually 'his') ivory tower teachings tell him to do – the ivory tower does not exist or, more accurately perhaps, is a rather useless place to dwell in.

All political decision-making, save perhaps in the rarest of circumstances, is situational, or contextual. Decision-makers rarely have the luxury to sit back and think things through; instead, usually, they have to act under time-pressure; they have to act without having all possible relevant information at their fingertips; and except in the crudest of dictatorships, they usually also have to take different

[23] Philosophers insist that calculability is an import aspect of consequentialism, hence, if calculations are impossible, consequentialism can have little traction – or else quickly slides into rough guidelines ('Beware Russia'), without much actual analysis. The point on calculability is emphasized by, e.g., Bernard Williams, *Morality: An Introduction to Ethics* (Cambridge: Canto, 1993 [1972]).

constituencies into account.[24] As Jackson forcefully puts it: 'Human conduct is situational by definition.'[25] Things would be helped if there were only a single rule or guideline applicable to the facts before them, but alas, this is a rare luxury too. Typically, decision-makers are confronted with the situation that somewhere in their normative universe, there exists a rule that tells them to do X; while elsewhere in that same universe, a different rule may tell them to do Y, or perhaps even prohibit them from doing X. In addition, it is not always clear what exact situation they find themselves in: even if there were a single rule applicable, they would first need to determine that their situation calls for this one rule to be applied – and that determination is itself an act of political judgment which is not, and cannot be, guided by the rule itself.[26]

When it comes to conflicts between rules stemming from two different legal systems, the notion of inter-legality may prove a useful explanatory framework – without being able to resolve the decision-makers' dilemma: its value is heuristic rather than normative. The source of the idea is, in all likelihood, a lecture by renowned legal sociologist Boaventura de Sousa Santos, held in 1987, where he launched the notion of inter-legality in distinction to the more familiar legal pluralism that was already widely accepted by legal anthropologists.[27] Legal pluralism, as usually defined, sees to the co-existence in one and the same legal space of two distinct legal orders based in two distinct but overlapping political communities, e.g. state law and tribal customary law. By contrast, so Santos suggested, inter-legality sees to competition (or cooperation) between legal norms emanating from different legal spaces but (at least *prima facie*) applicable to the same set of circumstances.

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[24] See, e.g., Friedrich V. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014); Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press, 2008).

[25] See Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford University Press, 2000), at 143.

[26] Kratochwil, *Status of Law.*

[27] The lecture was entitled 'Law: A Map of Misreading', and is reproduced in Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2nd edn. (London: Butterworths, 2002), 417-438, with the brief remarks on inter-legality appearing at 437-438. Comparativist Twining once or twice referred to inter-legality, but did not develop it much further. See, e.g., William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000), at 230; and William Twining, 'Diffusion and Globalization Discourse', (2006) 47 *Harvard International Law Journal*, 507-515. More detail is offered by Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006), 34-41.

A prime example – though not foreseen by Santos – is the rather well-known plight of Mr *Kadi*, confronted, on the one hand with frozen accounts on behalf of United Nations law, but claiming, on the other hand, human rights protection based on other legal instruments and the TEU. As is well-known, the ECJ eventually opted for application of the latter, but doing so was dictated by choice rather than necessity: it could just as plausibly (or even more plausibly) have argued that since UN law prevails over other law, therefore UN law would have to be applied, even to the detriment of the EU's constitutional order. The hallmark of inter-legality then, as Santos (very briefly) developed it, is that with conflicts of this kind, where many possible decisions may be plausible within their own four corners but none forcefully presents itself, the ultimate decision rests on the choice of the decision-maker – it can no longer be seen (if it ever could) as the inevitable result of the application of a legal rule. And this circumstance entails that the precise qualities, epistemological and otherwise, of those decision-makers are of relevance.[28]

Much the same applies to the situation where various ethical norms are pitted against each other, or where law conflicts with other normative orders – think of social mores, cultural norms, standards of self-regulation, et cetera.[29] Here too, it may well be problematic to apply one rule at the expense of another in the absence of a specific meta-rule: who is to say that in a conflict between an ethical standard and a legal rule, the ethical standard shall prevail? Or whether in case of a conflict involving social mores (think of so-called honour killings) and criminal law, the former shall prevail? The point is that there is no automatic ranking of normative orders, and that such ranking would, in all likelihood, either be impossible or at least occasionally undesirable.

In some sense, law could make a strong claim to normative supremacy – it has a lot going for it. It can be relatively clear, and it can be democratically made, with input, in principle, of all affected actors – or at least their representatives.[30] Thus,

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[28] See further Jan Klabbers and Gianluigi Palombella (eds.), *Inter-legality* (Cambridge University Press, forthcoming).

[29] See generally Klabbers and Piipariinen, *Normative Pluralism*.

[30] See Jan Klabbers, 'Law-making and Constitutionalism', in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009), 81-125.

one might argue that law ought to be supreme over other normative orders, but there are a few snakes in the grass.

One is, that while law in democracies can be democratically made, not all states are democracies, and that even among democracies several factors may exist which would affect the ideal nature of the law. Think, e.g., of capture of the law-making process by special interest groups, or think of election campaign financing rules, or the rules relating to the creation of voter districts, all of which can and are manipulated so as to dilute what could otherwise be a proper democracy. And think additionally of the unpleasant situation that some of the world's most problematic political leaders have been elected through ostensibly democratic process; in recent years, one can think of Putin, Erdogan and Trump. On the other hand, the contents of other normative orders cannot be intentionally created, or even democratically – there is no intentional constitutive process for the creation or amendment of ethical imperatives, e.g., whereas many other norms (religious norms come to my mind) are typically decreed from above, in more or less authoritarian – or at least authorial - fashion. It would seem, all in all, that there are no *a priori* reasons to prefer the commandments of one normative order over those of others, which in effect boils down to saying that it often boils down to a matter of choice and preference for the political actor concerned.

5. Practical Wisdom

Indeed, the political actor often has many choices to make, choices where the law can only offer limited guidance. This is ironic, of course: one of the functions of law is precisely to release us from having to make particular choices by routizining standard behavior that is deemed appropriate to the circumstances. The speed limit is the most obvious example: following the speed limit on any stretch of road prevents us from having to make calculations as to what the appropriate speed would be given the curvature of the road, the normal weather conditions, the quality of the asphalt or concrete, et cetera.[31]

[31] See generally Schauer, *Playing by the Rules.*

Yet, in political decision-making, it may not always work this way. As noted earlier, choice comes in at several moments. Choice comes in when there are different norms applicable to the same configuration of events, and choice comes in when trying to frame what the issue is about. The situation of Ms H can be seen as one that is largely internal to the Italian civil service; indeed, this is how the General Court perceived of the matter. It can also be described as a matter of the EU's foreign policy – this is, in a nutshell, how the Council saw the matter. And it can be seen as a matter of EU administration, mindful of the circumstance that even if Ms H was seconded by Italy, and even if she was nominally involved in a foreign policy operation, she was nonetheless working to represent the EU and in a rule of law mission at that. Likewise, the botched agreement with Ukraine can be seen as a commendable exercise of ethics on the part of the EU, but can also be seen as a manifestation of conditionality, or simply ineffectual geopolitical manoeuvering.

The point is, that in both examples, there is no meta-rule which can decide which viewpoint is the correct one. On the plight of Ms H, there is no meta-rule to decide whether the viewpoint of the General Court, the Council, or the ECJ, is correct: all three are plausible within their own four corners. And on Ukraine, likewise, there is no meta-rule to tell us whether to insist on an unblemished human rights record for our partners, or whether cooperation should help assist in achieving such a record, or even whether it is desirable to mingle in the internal affairs of a would-be partner state to the extent the EU did. These are not questions that can be answered in general manner, as they involve choice and therewith judgment on the part of the responsible political actor. And such judgment cannot be based on the application of a political algorithm (neither 'When finding trading partners, always insist on unblemished human rights records' nor 'When finding trading partners, ignore their human rights records'), for the context will always be different and, accordingly, judgment may differ from one case to the next.

There is nothing per se wrong with this: Aristotle already recognized 2500 years ago that politics is contextual, and there is no particular reason to presume that in the intervening millennia politics has ceased to be contextual. The media, of course, may look for inconsistencies, as these make for a good story, but even the

most self-righteous reporter will have to acknowledge that trading with Ukraine, located as it is next to Russia, carries different risks than does trading with, say, Nicaragua. And even the most self-righteous reporter will accept that a mission devoted to promoting the rule of law can ill-afford to deprive its own staff members from access to justice.

Importantly though, while Aristotle accepted the contextual nature of political action, he did not let this slide into a free-for-all, and neither did he succumb to the pessimism of philosophical situationalism (this suggests that all action is situational, and actors rarely, if ever, display consistent behavior across situations[32]). Instead, Aristotle developed a concise set of standards but, rather than focusing on the quality (ethical or otherwise) of concrete political acts, his framework revolved around the quality of the political actor. For Aristotle, man was a political animal, who could mostly excel in public life, and the goal of whose life was to reach a flourishing existence (*eudaimonia*).[33] To this end, the individual would be well-advised to develop a number of virtues, as these would enable him to flourish. Thus, honesty, courage, and humility were considered virtues – among many others, with two additional virtues being of prime importance. On the one hand, there was the virtue of justice, bringing the other virtues together. On the other hand, and of particular relevance in the present context, there was the virtue of practical wisdom: *phronesis*, as Aristotle referred to it, or *prudentia*, as Aquinas latinized it.[34]

Practical wisdom is a philosophically slippery concept, to be distinguished on the one hand from science and wisdom, but on the other also from mere technical competence as well as intuition.[35] Moreover, it has been suggested that to insist on *phronesis* makes that virtuous action will often be limited to an elite of *phronemoi*: try as we might to be humble and courageous, we can only manage to

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[32] This situationalism invokes psychological studies in support, but can be countered by other psychological studies. See, e.g., Nancy E. Snow, *Virtue as Social Intelligence* (London: Routledge, 2010), and Nancy E. Snow (ed.), *Cultivating Virtue: Perspectives from Philosophy, Theology, and Psychology* (Oxford University Press, 2015).

[33] A useful introduction is Alan Ryan, *On Aristotle: Saving Politics form Philosophy* (New York: Liveright, 2012).

[34] See in particular book VI of Aristotle, *Ethics* (London: Penguin, 1976, Thomson transl.).

[35] Some of the difficulties are discussed in Paula Gottlieb, *The Virtue of Aristotle's Ethics* (Cambridge University Press, 2009).

be called virtuous if we are also blessed with practical wisdom.[36] Others have defused this by suggesting that acting on virtue is like practicing skills, and within reach for practically anyone who can be considered a citizen.[37] Either way, what is clear is that *phronesis* involves the capacity to deliberate, reason, and take action. It is this intellectual virtue that allows us to recognize facts and situations and think through their consequences. In terms of the examples used: it is *phronesis* which helps us understand that being tough on Ukraine might create an opening for Russia to step in; it is *phronesis* that helps us to understand that the situation of Ms H is not best seen as an Italian administrative affair, or exclusively as a matter of foreign policy. Precisely at the vanishing point of our rules and commandments, where these are no longer capable of offering guidance, is where the virtues come in – at least, this is one of the points where they come in. There are other points as well – think only of making proper use of existing rules, rather than engaging in an '*abus de droit*'. But at the very least, the virtues should assist us in distinguishing different situations, and reaching for action that is based on justice rather than opportunism – and justice is the defining claim made by all legal systems.[38]

6. Too Much Law?

The EU's Common Foreign and Security Policy is embedded in a conglomerate of numerous rules. Many of those rules are legal rules: the CFSP is embedded, e.g., in international law, both when it comes to prescriptions and proscriptions ('Thou Shalt Not Invade') and when it comes to the broader legal framework, such as represented by notions of jurisdiction or responsibility. It is not for the EU to single-handedly depart from international law, nor is it for the EU to insist that international law be re-written so as to accommodate its special nature.[39]

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[36] See Julia Driver, *Uneasy Virtue* (Cambridge University Press, 2001).
[37] See Julia Annas, *Intelligent Virtue* (Oxford University Press, 2011).
[38] See Mortimer N.S. Sellers, 'Law, Reason, and Emotion' (unpublished paper, 2017, on file with the author).
[39] For such an argument, see Delano Verwey, *The European Community, the European Union and the International Law of Treaties* (The Hague: TMC Asser Press, 2004).

Many of the other applicable legal rules are internal to the EU, and aim to preserve an institutional balance that may or may not derive from an arbitrary equilibrium, valid at the moment of codification but perhaps no longer. Some may serve to protect the prerogatives of some of the institutions; others may insulate the CFSP from intrusion by some of the institutions – think in particular of the provisions excluding the Parliament or the Court of Justice.

Moreover, the EU is also embedded in an ethical *nomos*. It is no good to claim that, technically, the EU is not bound to respect the norms of international humanitarian law in those conflicts where it intervenes because, well, technically, it is not a party to the Geneva Conventions and an argument can be made that existing customary international law cannot plausibly be applied to entities that are not states without taking a few further jurisprudential steps.[40] Likewise, the EU should not engage in genocide or gross human rights violations, neither by act nor by omission.[41] In addition, EU troops and police forces will carry with them their own ethical traditions and military rules, while administrators too will be influenced and steered by their own professional standards: Ms H, being a lawyer trained in Italy, will be unable to de-activate her years of training and the sense of propriety inculcated during these years, even when seconded to operations outside Italy. In other words, there is in principle an enormous amount of rules and standards vying for recognition within even every single individual, let alone within multinational units such as, typically, those involved in actions coming under the CFSP. Too ask whether there is 'too much law' here is a bit like asking whether there is too much time in a 24-hour period.

On the other hand, in a sense there is too much law. Law has the unpleasant side-effect, occasionally, of dulling our sense of the virtues, and perhaps even our sense of outrage. Put differently, the existence of a legal rule invites the evaluation of action (past of future) in light of that rule. If the speed limit indicates 50 miles per hour, our driving will be discussed in terms not whether it was too fast per se, but whether it was too fast in light of the speed limit. This is not normally

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[40] For discussion, see Jan Klabbers, 'The Sources of International Organizations Law', in Samantha Besson and Jean d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, forthcoming).

[41] On the concept of omission and international institutional law, see Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act', *European Journal of International Law*, forthcoming.

a problem, but sometimes may become one: if, e.g., an oil spill has taken place on the road ahead of us, 45 miles per hour may all of a sudden be way too fast, even if technically it remains within the speed limit. A more dramatic example is how the European Court of Human Rights, in 2013, came close to denying the Armenian genocide for the simple (and really excruciating) reason that since the Genocide Convention had only been concluded in 1948, it seemed dubious whether the Armenia genocide could be considered a proper genocide, notwithstanding the circumstance that up to one and a half million people were intentionally slaughtered for reasons related to their descent. Here, analysis of the event in terms of law took over at the expense of a more common sense or emphatic approach. Then again, maybe the problem is not that there is too much law here, but that the lawyers cling to their *techne* and ignore *phronesis* and other virtues.[42]

7. To Conclude

It goes without saying that modern societies cannot do without rules, whether we call these law or, as is increasingly common in international affairs, think of them as norms, standards, or guidelines, legally binding or otherwise authoritative and meant to influence behaviour. If rules are indeed signposts flagging desirable and commendable behaviour without having to think twice, then no society can do without.[43]

On the other hand, it is also the case that rules (whether legal or otherwise) cannot prescribe the conditions for their own application in all possible scenarios, and cannot dictate their own interpretation in all possible circumstances; hence, while a seven-year old may be able to apply a given rule, applying it wisely takes a little more than a dictionary or an algorithm. It takes, as Aristotle put it, a certain degree of *phronesis*, of practical wisdom. There may be circumstances where

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[42] See *Perincek* v *Switzerland*, application no. 27510/08, especially the Chamber decision of 17 December 2013. I have discussed this at length in Jan Klabbers, 'Doing Justice? Bureaucracy, the Rule of Law, and Virtue Ethics', (2017) 6 *Rivista di Filosofia del Diritto*, 27-50.

[43] Some have interpreted me as suggesting that rules should be replaced by an emphasis on virtue, but such is based on a misreading of some of my work. For an example, see Inger Österdahl, '(International) Law!', in Rain Liivoja and Jarna Petman (eds.), *International Law-making: Essays in Honour of Jan Klabbers* (London: Routledge, 2014), 121-135.

there is too little law; there may be circumstances where there is too much law. The two examples explored above suggests that there may be also be circumstances where there is too little practice wisdom. But there are unlikely to be circumstances where there is too much practical wisdom.